

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	No. 4:01 CR 328 JCH
)	DDN
LAWANIKA DARLING,)	
)	
)	
Defendant.)	

ORDER AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

This action is before the Court upon the pretrial motions of the parties which were referred to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b). An evidentiary hearing was held on September 5, 2001.

1. Pretrial disclosure of evidence.

Defendant Lawanika Darling has moved for government agents to retain the rough notes of their investigation (Doc. No. 16), and for production and inspection of grand jury transcripts or reports (Doc. No. 17).

In response to these motions, counsel for the United States informed the court, and at the hearing defense counsel agreed, that the government has provided defense counsel with pretrial disclosure of all information and reports to which the defendant is entitled and that the government agents would preserve any relevant rough notes of their investigation. Furthermore, the government has provided defendant with a copy of the grand jury transcript of this case.

Therefore, it clearly appears that defendant has received pretrial disclosure of all evidence and information to which she is entitled. Therefore, these motions will be denied as moot.

2. Motion to dismiss.

Defendant has moved to dismiss the indictment (Doc. No. 18) stating generally the grounds that the indictment is legally insufficient on its face, is not supported by legally sufficient evidence, and is based upon unconstitutional laws.

To be legally sufficient on its face, the indictment must contain all the essential elements of each offense charged, it must fairly inform the defendant of the charges against which she must defend, and it must allege sufficient information to allow the defendant to plead a conviction or an acquittal as a bar to a future prosecution. U.S. Const. amends. V and VI; Fed. R. Crim. P. 7(c); Hamling v. United States, 418 U.S. 87, 117 (1974); United States v. White, 241 F.3d 1015, 1021 (8th Cir. 2001).

In this case defendant is charged in one count with causing the transmission in interstate commerce of a fraudulent purchase order in violation of 18 U.S.C. § 1343. The indictment contains the essential elements of this offense: (1) the creation of a plan or scheme to defraud by the defendant; (2) in furtherance of this plan or scheme, the defendant made false statements or created false pretenses she knew were false; (3) the false statements or pretenses were material; (4) defendant acted with the intention of obtaining money by the false statements or pretenses; (5) it was foreseeable that interstate communication would be used in furtherance of the fraudulent plan or scheme; and (6) interstate communication was used in furtherance of the plan or scheme. United States v. Manzer, 69 F.3d 222, 226 (8th Cir. 1995); United States v. Proffit, 49 F.3d 404, 406 n.1 (8th Cir. 1995); United States v. Begnaud, 783 F.2d 144, 146-47 (8th Cir. 1986). Therefore, the indictment is legally sufficient on its face.

Because the indictment is legally sufficient on its face, the Court should not further investigate to determine whether it is supported by legally obtained and sufficient evidence. United

States v. Calandra, 414 U.S. 338, 349-52 (1974); Costello v. United States, 350 U.S. 359, 363-64 (1956).

Defendant did not advise the Court of the specific basis for the argument that the indictment is based upon unconstitutional law. See Order Concerning Pretrial Motions, filed August 1, 2001, at 3. The Court will not sua sponte survey the law to determine a basis for defendant's argument.

For these reasons, the motion to dismiss should be denied.

3. Motion to suppress evidence.

The government has moved for a determination of admissibility of arguably suppressible evidence (Doc. No. 10). Defendant has moved to suppress evidence and statements (Doc. No. 19).

From the evidence adduced at the hearing, the undersigned makes the following findings of fact and conclusions of law:

FACTS

1. During 2001, defendant Lawanika Darling was an employee of the Famous Barr retail department stores in the St. Louis area. She was in charge of special orders of men's shoes. In March 2001, Shelly Irudy,¹ the Famous Barr Manager of Internal Investigations, investigated reported thefts occurring in Darling's department. Irudy determined that Darling was involved in false sales of shoes, false purchase orders, and the delivery of falsely ordered shoes to her own residence.

2. By at least May 2001, Famous Barr had advised the United States Postal Inspection Service of its investigation of Darling and provided Postal Inspector Scott Sullivan with information, including a spreadsheet of information prepared by Irudy, that

¹Phonetic spelling.

indicated the possibility that Darling had committed mail or wire fraud in the sales of shoes.

3. On May 16, 2001, John Lilliard, a Famous Barr division vice-president and Director of Loss Prevention, interviewed Darling. Before he interviewed her, Lilliard advised the postal inspectors that he wanted to speak with Darling before the inspectors interviewed her so that he could determine whether or not there were other Famous Barr employees involved in the fraud. He told the inspectors that he would advise them about how the interview went. The postal inspectors did not participate in, direct, or control Lilliard's interview of Darling.

4. During the morning of May 16, after Darling had come to work at Famous Barr, Lilliard had Darling's supervisor bring her to Lilliard's office. Lilliard met them at the elevator on his floor, introduced himself to her, and directed her into an office. Present in the office were Darling, Lilliard, and Irudy; no government law enforcement official was present during the interview. At the beginning of the interview, Lilliard introduced Irudy to Darling and told her about their Famous Barr positions. Lilliard had never met Darling previously. Then he and Irudy described the information their investigation had developed about the fraudulent shoe transactions; they laid before her the spreadsheet chart of information developed by Irudy during the investigation. They asked Darling to identify the people who purchased the shoes through her and what their relationships were to her. During the interview Darling made oral incriminating statements. When Lilliard told Darling that over 500 pairs of shoes and a loss of more than \$79,000 were involved, Darling was surprised. Lilliard told her that he understood how such a scheme can escalate beyond the perpetrator's expectation.

5. Next, Lilliard asked Darling to reduce her statement to writing and to use her own words. He told her that he wanted "a

commitment statement" from her about what she had told him. He asked her to provide specific information. She handwrote a statement and affirmed specific information which was shown to her on the Famous Barr spreadsheet chart. The interview with the Famous Barr personnel ended when Darling finished writing her statement. She signed the statement at 11:15 a.m. Gov. Exh. 1. At the end of his interview, Lilliard told Darling that there were representatives of the Postal Inspection Service there to speak with her about this matter. He did not explain to her the law enforcement significance of the inspectors.

6. During the Famous Barr interview, the door to the office was closed. Darling never left the room, but she never asked to do so and she would have been allowed to leave had she asked. Also, Lilliard would have allowed her to make telephone calls during the interview, but Darling never asked to do so. During the interview with the Famous Barr personnel, Darling was not advised of her constitutional rights to remain silent and to counsel. She was not told that her statements would be provided to law enforcement officials.

7. After the interview, Lilliard spoke with Inspector Sullivan and told him what Darling had said during the interview. He told Sullivan he believed that Darling was the only Famous Barr employee involved in the theft. At that time Lilliard did not give to the inspectors a copy of Darling's written statement.

8. Next, at approximately 11:30 a.m., shortly after the conclusion of Lilliard's interview with Darling, Postal Inspectors Sullivan and Boland interviewed her in the same Famous Barr office. They were dressed in civilian clothes. At the beginning of this interview the inspectors identified themselves as federal law enforcement officials; they told her that they investigated fraud. Inspector Sullivan told her that they would like to talk with her, that she did not have to speak with them or answer their questions,

and that she could tell them to leave. He also advised her that she was not under arrest, that she could leave at any time, that she would not be arrested at all that day, and that she could stop the interview at any time. He told her that Famous Barr had provided him with information and documents that indicated that she was a principal suspect in store theft. He did not advise her of her constitutional rights to remain silent and to counsel.

9. Thereafter, in response to the inspectors' questions, Darling made oral statements. During the interview, Sullivan told her that it was not right for her to take full responsibility, if someone else is also involved in the theft. Darling indicated she was the only person involved in the thefts; she never denied involvement in the fraudulent activity. At Sullivan's request, Darling said that Sullivan could use the written statement she had given to the Famous Barr personnel. Inspector Sullivan told Darling that he would present his information to the United States Attorney who would decide whether or not to bring federal charges.

10. The interview with the inspectors concluded after approximately one hour. During the interview Darling never asked to make a telephone call. After the interview, Darling was not arrested or detained.

DISCUSSION

The motion to suppress should be denied. The only items of arguably suppressible evidence indicated at the hearing are the defendant's oral and written statements to her employer and to the United States Postal Inspectors. This factual context presents several issues.

The government has the burden of establishing the admissibility of a defendant's pretrial statements by a preponderance of the evidence. Colorado v. Connelly, 479 U.S. 157, 169-70 (1986); Lego v. Twomey, 404 U.S. 477, 489 (1972); United

States v. Astello, 241 F.3d 965, 966 (8th Cir. 2001); United States v. Black Bear, 878 F.2d 213, 214 (8th Cir. 1989).

The admissibility of post-arrest statements of a defendant which resulted from police interrogation depends upon whether the defendant had been advised of her rights, as prescribed by Miranda v. Arizona, 384 U.S. 436 (1966); whether the defendant knowingly and voluntarily waived the Miranda rights, North Carolina v. Butler, 441 U.S. 369, 373, 375-76 (1979); and whether the statements were voluntary.

Miranda v. Arizona requires law enforcement officers to inform an arrested person (1) that she has the right to remain silent, (2) that her statements may be used against her at trial, (3) that she has the right to be represented by an attorney being present during an interrogation, and (4) that, if she cannot afford to hire an attorney, one will be appointed for her. A defendant who is not given her Miranda rights is not entitled to relief, however, if she is not subjected to law enforcement interrogation while in custody -- both factors being necessary. Miranda v. Arizona, 384 U.S. at 477-78; Illinois v. Perkins, 496 U.S. 292 (1990).

In this case, defendant Darling was first interrogated by her employer, Famous Barr. The Supreme Court has expressly held that the constraints of the Fifth Amendment right not to be compelled to incriminate oneself do not apply to purely private activity. Colorado v. Connelly, 479 U.S. at 166 (even "outrageous behavior by a private party" does not violate the Fifth Amendment). "The courts have consistently held that the mere fact that an individual's job involves the investigation of crime does not transform him into a government actor." United States v. Garlock, 19 F.3d 441, 443 (8th Cir. 1994) (bank security officer and corporate auditor were not acting as instruments of the state when they obtained the confession of defendant regarding embezzlement of

bank funds, and therefore they were not obligated to give defendant Miranda warnings before conducting custodial investigation).

In certain circumstances, however, the government can exercise such control over a private actor that a "private" action can fairly be attributed to the government for purposes of the Fifth Amendment. Id. The test is whether "in light of all the circumstances," the store personnel "acted as an instrument or agent of the government." Id. (quoted case citation omitted). A defendant can meet this test by showing that "the government exercised such coercive power or such significant encouragement that it is responsible" for their conduct, or that the exercised powers are the "exclusive prerogative of the government." Id. (quoted case citation omitted). Such is not the case here.

Here defendant Darling has failed to show that the postal inspectors directed, coerced, or encouraged the actions of the Famous Barr personnel to such an extent that the government personnel became responsible for those actions. The government exercised no control over the manner in which Famous Barr maintained its internal security. This is not a case in which police officials used private persons to target a particular suspect. Famous Barr determined the identity of a primary suspect through its own investigation. It also had its own substantial interests in learning whether or not there were other employees involved in the thefts. The inspectors merely allowed the Famous Barr personnel to conclude their interview of defendant before conducting their own.

Following the interview of defendant by the Famous Barr security personnel, defendant was interviewed by the two inspectors who were performing their own duties. The record is clear that they did not advise defendant of her Miranda rights prior to interrogating her. The issue presented is whether at that time she was "in custody" for Miranda purposes.

A person is "in custody"

"when [she] has been formally arrested or [her] freedom of movement has been restrained to a degree associated with a formal arrest." United States v. Goudreau, 854 F.2d 1097, 1098 (8th Cir. 1988) (citing California v. Beheler, 463 U.S. 1121, 1125 (1983) (per curiam)). In United States v. Griffin we enumerated six indicia of custody:

(1) whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to do so, or that the suspect was not considered under arrest; (2) whether the suspect possessed unrestrained freedom of movement during questioning; (3) whether the suspect initiated contact with authorities or voluntarily acquiesced to official request to respond to questions; (4) whether strong arm tactics or deceptive stratagems were employed during questioning; (5) whether the atmosphere of the questioning was police dominated; and (6) whether the suspect was placed under arrest at the termination of the questioning.

Id., 922 F.2d at 1349. The presence of the first three indicia tends to mitigate the existence of custody at the time of questioning; the presence of the last three indicia aggravate the existence of custody. Id.

United States v. Brown, 990 F.2d 397, 399 (8th Cir. 1993).

Relevant to (2) is whether the suspect was handcuffed or otherwise (e.g. by the physical blocking of the way out of the area of interrogation) physically restrained during the interrogation. Relevant to (4) is whether a reasonable person would have believed that she was under formal arrest or free to go about her business. Relevant to (5) are the length and place of the interview. Brown, 990 F.2d at 400. See also, Stansbury v. California, 511 U.S. 318, 322-25 (1994).

Defendant was not "in custody" when the inspectors interviewed her. When she gave her statements to the inspectors, she had been

told that she did not have to speak with them, that she was not then under arrest and would not be arrested that day, and that she could stop the interview at any time. The interview did not occur in a government law enforcement office but in the office of her employer. There was no evidence that she was physically restrained or told that she could not leave. While she did not initiate the interviews, she did not stop them after being told she could do so. Further, no strong arm tactics were used to get her to cooperate. Under these circumstances, the undersigned concludes that a reasonable person in defendant's circumstances would not have believed that her freedom of movement was limited to any substantial degree.

Defendant Darling's statements, oral and written, to the Famous Barr personnel and to the postal inspectors were voluntary, because they were not the result of overreaching, such as coercion, deception, or intimidation; her will was not overborne and her ability to decide not to cooperate was not impaired. Colorado v. Connelly, 479 U.S. at 169-70; United State v. Jordan, 150 F.3d 895, 898 (8th Cir. 1998), cert. denied, 526 U.S. 1010 (1999).

For these reasons,

IT IS HEREBY ORDERED that the motions of defendant for government agents to retain rough notes (Doc. No. 16), and for production and inspection of grand jury transcripts or reports (Doc. No. 17) are denied.

IT IS FURTHER ORDERED that the motion of the United States for a determination of admissibility of evidence (Doc. No. 10) is sustained.

IT IS HEREBY RECOMMENDED that the motion of defendant to dismiss the indictment (Doc. No. 18) be denied.

IT IS FURTHER RECOMMENDED that the motion of defendant to suppress evidence and statements (Doc. No. 19) be denied.

The parties are advised they have ten (10) days to file written objections to this Order and Recommendation. The failure to file objections may result in a waiver of the right to appeal issues of fact.

UNITED STATES MAGISTRATE JUDGE

Signed this _____ day of September, 2001.